ORIGINAL COPY

NO. 80-6786

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT STRICKLAND,

Petitioner,

v.

STATE OF GEORGIA,

Respondent,

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the trial court's denial of defense counsel's request to be present during Petitioner's court ordered psychiatric examination constituted a denial of Petitioner's rights to due process and equal protection of the law?

2.

Whether the trial court erred by not summarily declaring Petitioner to be incompetent to stand trial after receiving the psychiatric evaluation of Petitioner?

3.

Whether the trial court committed error of a constitutional magnitude by requiring Petitioner to plead to the indictment prior to the filing and determination on a special plea of incompetency to stand trial?

4.

Whether the evidence produced on the trial of Petitioner's special plea of incompetency to stand trial was constitutionally sufficient to support the jury's finding against Petitioner?

5.

Whether, because the issue of Petitioner's competency to stand trial had already been decided adversely to Petitioner, the trial court erred by refusing to allow defense counsel, on the trial of the main case, to explain during his opening statement and closing argument the consequences of a jury finding in favor of the special plea?

6.

Whether the trial court committed error of a constitutional magnitude by sustaining the district attorney's objection to an irrelevant and immaterial question propounded by counsel for Petitioner on direct examination of his own expert?

7.

Whether the trial court properly sustained the district attorney's objection made during Petitioner's closing argument when counsel for Petitioner attempted to argue the consequences of the jury's finding of not guilty by reason of insanity?

8.

Whether, under the facts of this instant case, the § (b)7 aggravating circumstance passes constitutional muster?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

(i)

Petitioner was convicted of the murders of Eddie Lee Carroll, Lester Lee Carroll, and Bonnie Mae Carroll, and for aggravated assault upon Junie Irene Carroll, Elizabeth June Carroll and Cecil Carroll on January 14, 1980, in the Superior Court of Hall County, Georgia upon Indictment No. P-45860. Following a trial by jury Petitioner was convicted on all six counts and sentences of death were imposed for each murder. Consecutive sentences of ten years imprisonment were imposed on each of the three counts of aggravated assault.

On direct appeal Petitioner's convictions and sentences were affirmed at Strickland v. State, 247Ga. 219, ___S.E.2d ___ (1981). Thereafter, on March 30, 1981, Petitioner's motion for a rehearing was denied.

On April 20, 1981, this Court granted Petitioner an extension of time until June 2, 1981, within which to file his brief and petition for a writ of certiorari.

On June 30, 1981, counsel for Respondent was served with his appearance form, which form indicated that Petitioner's petition for a writ of certiorari was timely docketed in this Court on June 1, 1981.

On July 6, 1981, counsel for Respondent, for the first time, received via mail a copy of Petitioner's petition for a writ of certiorari. This timely Brief in Opposition follows.

The facts underlying Petitioner's convictions and sentences are adequately set forth in the Supreme Court of Georgia's opinion rendered on direct appeal [Respondent's Exhibit A], however, for this Court's convenience the aforementioned facts are repeated below.

The evidence produced at trial reflected that June Carroll and Petitioner had dated for several years. Though June had terminated the relationship, Petitioner tried unsuccessfully on numerous occasions to reestablish the relationship. Alternatively, Petitioner begged June to be his wife and then threatened her if she refused. Approximately three weeks prior to November 30, 1979 [the date of the murders]Petitioner had asked June how she would feel if he killed her mother, brother and sister so that she could know how it was to lose someone she loved. Petitioner sounded forceful. Upset by the conversation, June hung up the telephone.

Subsequently, Petitioner wrote June several letters, pleading, sometimes on religious grounds, for her to marry him, and alternatively threatening that if she refused he would go insane and do something he would be sorry for. In the aforementioned letters, Petitioner agreed to keep his temper under control, to be gentle, and to attend church with her. The last of the letters, postmarked November 29, 1979 [the day before the murders], had "last letter" written on the envelope. In it, Petitioner wrote that he could be pushed only so far, that he must prove to her that he had said what he meant, and that if she were to date anyone else he would do what he said he would do.

On the evening of June 29, 1979, Petitioner went to the Carroll residence and attempted to convince June that they were in fact man and wife within the meaning of certain biblical verses. When the discussion became unpleasant, and one of June's male relatives asked Petitioner to leave, Petitioner left stating, "I'll see ya'll in court."

During the day of November 30, 1979, the date of the murders, Petitioner bought a box of 9mm ammunition and attempted to buy an extra clip for his Browning high-powered 9mm semi-automatic pistol. That night, Petitioner went again to June's residence under the pretext of wanting to pick up some things he had given June in the past. Petitioner wore a heavy coat into the Carroll residence for the purpose of concealing the large semi-automatic pistol. Once inside Petitioner followed June back to her bedroom, all the while continuing to plead with her about their relationship.

After June left the room, hoping Petitioner would also leave, June heard her sister Bonnie tell Petitioner, "You're getting June upset, why don't you just leave her alone and leave?" June heard Petitioner respond in a loud voice, "I've heard enough of you, shut your damn mouth," afterwards June heard her sister Bonnie scream, "No, Rob don't."

At that moment the shooting started. While Petitioner was shooting Bonnie, June ran to the hall telephone to summon help. Petitioner followed her into the hallway. While June plead for mercy, Petitioner methodically first shot the telephone, and then shot June twice in the abdomen, twice in each thigh, five times in her lower buttocks around her rectum and vagina, and once in her right foot. While leaving

the Carroll home, Petitioner shot and killed June's disabled brother, Eddie, killed her father, Lester, and wounded her mother, Junie. June's brother Cecil saw Petitioner shooting and the empty cartridges flying from the pistol, but he ran and avoided either being killed or wounded by hiding.

Once outside in the yard, Petitioner shot through the gas tank of the Carroll automobile before driving away.

An ambulance dispatcher on duty on the night of the shootings testified that he received a telephone call from a male who stated that an ambulance was needed on Whitmire Circle because there were five to seven people lying up there dead. The caller declined to give his name and telephone number but identified the residence on Whitmire Circle where the bodies could be found. The caller said he was the one who had done it, that he was insane and that he had been under medical care. When the dispatcher asked the caller to identify his own location, the caller said he was at a pay telephone booth in White County; that the telephone in the victims' house was not working, and that he [the caller] would turn himself into police at a later time.

At Petitioner's trial, the investigating officers and the surviving members of the Carroll family described the crime scene, including the <u>many</u> shots that were fired and the position of the bodies. An empty clip for a 9mm pistol of the type found in Petitioner's automobile at the time of his arrest was also found in the Carroll's home. When Petitioner was arrested, the pistol's clip was loaded alternatively with solid and hollow point bullets. The pistol was lying on the automobile seat within easy reach of the Petitioner. At the time of his arrest Petitioner asked the officers why he

was being arrested since he had already agreed to turn himself in.

Ballistics evidence produced at trial established that the many empty pistol cartridge casings found in and outside the Carroll home were fired in Petitioner's pistol. Bullets removed from the victims' bodies had been fired from Petitioner's pistol also.

Medical testimony established that Bonnie's face and head were badly mutilated by either four or five shots fired at a distance of six inches or less. The exact number of shots could not be determined because of the massive damage and disfigurement to her face. Bonnie died from injuries directly to her brain. Lester was shot twice in the left side and once in the neck. He died of his chest wounds. Eddie died of two shots in his chest and abdomen.

The surviving members of the Carroll family appeared and testified at trial for the prosecution. Based upon all of the aforementioned evidence the jury appropriately found Petitioner guilty on all counts.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER'S CONTENTION THAT HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S REQUEST TO BE PRESENT DURING PETITIONER'S COURT ORDERED PSYCHIATRIC EXAMINATION, IS WITHOUT MERIT.
(Contention No. 1).

Here on this petition for a writ of certiorari Petitioner contends that the trial court erred in denying his trial counsel's request to be present during his [Petitioner's] competency evaluation. The trial transcript reveals that while defense counsel initially consented to a psychiatric evaluation of Petitioner, that consent was withdrawn when counsel was informed that the trial court was not inclined to allow his presence during the same. (T. 17). The trial court then exercised its inherent authority to order a psychiatric evaluation and denied defense counsel's request that he be present. Presnell v. State, 241 Ga. 49, 56(6), 243 S.E.2d 496 (1978); Griggs v. State, 241 Ga. 317, 245 S.E.2d 269 (1978). See Estelle v. Smith, ___ U.S.___, 29 Crim. L. Rept. 3031 (1981).

On appeal to the Supreme Court of Georgia Petitioner did not challenge the authority of the trial court to order the subject psychiatric evaluation. Thus any such challenge presented for the first time here on this instant petition would not properly be before the Court. Cardinale v. Louisiana, 394 U.S. 437 (1969).

With reference to Petitioner's contention that his counsel possessed a constitutional right to be present during the subject evaluation, in United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), the Court stated the following:

> "Likewise, we reject Appellant's claim of a constitutional right to have an attorney present at the psychiatric examination since that might defeat the purpose of the examination and since the examination is not the kind of critical stage at which assistance of counsel is needed or even useful." Id., at 48.

But see Estelle v. Smith, ___U.S.___, 29 Crim. L. Rept. 3031 (1981), wherein this Court concluded that a defendant's Fifth Amendment rights are violated if he is compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding under circumstances where the criminal defendant neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence at trial. In Estelle v. Smith, supra, this Court further stated that Smith's Sixth Amendment rights were also violated in that defense counsel had not been notified in advance of the psychiatric examination, nor of the fact that the examination would not only encompass Smith's competency to stand trial but also the issue of Smith's "future dangerousness."

As is readily apparent, Estelle v. Smith, supra, is distinguishable from this instant case in that Petitioner here does not contend that his Fifth nor Sixth Amendment rights were violated, but only that he was allegedly denied due process and the equal protection of the law under the

Fourteenth Amendment. In addition to the foregoing distinction, Respondent notes that in Estelle v. Smith, supra, this Court did not hold that a criminal defendant is entitled to the presence of counsel at a court ordered competency or psychiatric evaluation. The foregoing point is especially made clear in the concurring opinion of Justice Rehnquist. Thirdly, Respondent notes that in Estelle v. Smith, supra, this Court stated that a totally different situation arises, with regards to a criminal defendant's Fifth and Sixth Amendment rights, where the defendant intends to introduce psychiatric evidence at trial. Id., at Crim. L. Rept. 3036.

Over and above the foregoing distinctions, the issue for resolution is whether Petitioner was denied due process of law or the equal protection of the laws by the trial court's denial of counsel's request to be present during a court ordered competency examination. As is revealed by an examination of Estelle v. Smith, supra, in a situation such as that presented to the court by the instant case, i.e., wherein the examination was limited to Petitioner's competency to stand trial, and defense counsel was given adequate notice and an opportunity to consult with his client prior to submission to the ordered competency examination, and where the defendant had raised as an issue his competency to stand trial, Petitioner's defense counsel possessed no constitutional right to be present during a properly court ordered competency examination.

In addition to the absence of any constitutional or state statutory right to have counsel present during a court ordered competency examination, the Respondent notes that the results of the examination proved to be favorable to Petitioner and that Petitioner made use of the same at the proceedings on

his special plea of incompetency to stand trial, and at the trial itself. As noted by the Supreme Court of Georgia in Chenault v. State, 234 Ga. 216, 220, 215 S.E.2d 223 (1975):

> "When a plaintiff in error brings a case here, he must show error which has hurt him. This Court is not an expounder of theoretical law, but it administers practical law, and corrects only such errors as have practically wronged the complaining party."

Accordingly, because Petitioner possess no constitutional right to the presence of counsel during a court ordered competency examination, and because Petitioner cannot demonstrate any resulting harm occasioned by the subject examination, this contention cannot serve as the basis for the granting of the requested writ.

B. PETITIONER'S CONTENTION THAT THE TRIAL COURT ERRED BY NOT SUMMARILY DECLARING PETITIONER TO BE INCOMPETENT TO STAND TRIAL AFTER RECEIVING THE PSYCHIATRIC EVALUATION OF PETITIONER FAILS TO STATE A VIOLATION OF ANY CONSTITUTIONALLY GUARANTEED RIGHT.
(Contention No. 2).

On this contention Petitioner alleges that the trial court committed error of a constitutional magnitude by not summarily declaring him to be mentally incompetent to stand trial as a matter of law after its [the trial court's] receipt of Petitioner's psychiatric evaluation by the Forensic Service Team. In response the Respondent initially notes that Ga. Code Ann. § 27-1502, in pertinent part, specifically provides that whenever a defendant in a criminal case files a special plea of incompetency to stand trial, ". . . it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury." (Emphasis added). Accordingly, pursuant to a binding statutory directive, the trial court properly submitted the issue of Petitioner's competency to stand trial to a special jury.

Secondly, the Respondent notes that in the subject report the Forensic Service Team, contrary to Petitioner's representations, did not unequivocally declare Petitioner incompetent to stand trial. The report showed that Petitioner

could understand the charges against him and appreciate the consequences of a conviction upon the same, and that Petitioner could communicate with his attorney.[1/] The subject report merely expressed concern with Petitioner's ability to deal emotionally with the testimony against him. Thus, there exists no factual basis in the record to support this contention.

Thirdly, Respondent notes that this contention addresses itself to nothing more than an alleged trial error or irregularity, and that the same fails to rise to the level of constitutional dimensions. Accordingly, this contention cannot serve as the basis for granting the requested writ.

C. PETITIONER'S CONTENTION THAT THE TRIAL COURT COMMITTED ERROR OF A CONSTITUTIONAL MAGNITUDE BY REQUIRING PETITIONER TO PLEAD TO THE INDICTMENT PRIOR TO THE FILING AND DETERMINATION ON A SPECIAL PLEA OF INCOMPETENCY TO STAND TRIAL IS WITHOUT MERIT. (Contention No. 3).

On this contention Petitioner alleges that the trial court committed error of a constitutional magnitude by requiring him to plead to the indictment prior to the determination of Petitioner's special plea of incompetency to stand trial. The record however, reflects that while represented by counsel Petitioner pled to the indictment on January 18, 1980. (R. 5).

1/ The issue on a special plea of insanity is "whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands." Brown v. State, 215 Ga. 784, 787, 113 S.E.2d 618 (1960).

Petitioner's plea of incompetency to stand trial however, was not filed until January 21, 1981, some three days later. (R. 17-19). Thus, the record provides no factual basis for the support of this contention and thus this contention cannot serve as the basis for the granting of the requested writ.

D. PETITIONER'S CONTENTION THAT THE EVIDENCE PRODUCED ON THE TRIAL OF HIS SPECIAL PLEA OF INCOMPETENCY WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE JURY'S FINDING AGAINST HIM IS WITHOUT MERIT. (Contention No. 4).

Under Georgia law in a proceeding on a special plea of incompetency to stand trial the burden rests upon the Petitioner to make out his case by a preponderance of the evidence. Coker v. State, 234 Ga. 555,216 S.E.2d 782(1975). Further, on appellate review the appellate court will not overturn a jury's finding against a special plea unless the evidence warrants a finding for the petitioner as a matter of law.

> "The determination of a preponderance of the evidence is for the jury. This Court will not set aside a verdict (or judgment) finding against a special plea of incompetency at the time of the trial unless it appears that the evidence demands a finding in favor of the plea. (Cites omitted)." Id., at 564.

On the special plea of incompetency members of the Forensic Service Team testified that they were concerned with whether or not Petitioner would be able to control his

emotions during trial on the indictments, and whether Petitioner might become suicidal. Dr. Ermutlu also testified, "I felt that he was aware of the charge, and he was aware of the consequences, and I also felt that he probably could communicate with his lawyer, if some relationship was established."

In addition to the foregoing the state also produced an abundance of lay testimony indicating that Petitioner was feigning incompetency.

In light of the evidence produced, and the presumption of sanity, the determination on the merits of Petitioner's special plea became a question of fact for the jury's determination. Leggett v. State, 244 Ga. 226,259 S.E.2d 476 (1979). Thus, the trial court properly submitted the issue to the jury, and the evidence reveals that their determination adverse to Petitioner is amply supported. Accordingly, this contention cannot serve as the basis for the granting of the requested writ.

E. BECAUSE THE ISSUE OF PETITIONER'S COMPETENCY TO STAND TRIAL HAD ALREADY BEEN DECIDED ADVERSELY TO PETITIONER, THE TRIAL COURT DID NOT ERR BY REFUSING TO ALLOW DEFENSE COUNSEL, ON THE TRIAL OF THE MAIN CASE, TO EXPLAIN DURING HIS OPENING STATEMENT AND CLOSING ARGUMENT THE CONSEQUENCES OF A JURY FINDING IN FAVOR OF THE SPECIAL PLEA. (Contention No. 5).

On this contention Petitioner alleges that the trial court, at pages 1031-1035 of the trial transcript, committed

error of a constitutional magnitude by preventing him from interjecting the issue of Petitioner's competency to stand trial into the trial of the main case, notwithstanding the fact that the issue of Petitioner's competency had already been resolved adversely to Petitioner on the trial of his special plea.

As is revealed by an examination of Crawford v. State, 240 Ga. 321,240 S.E.2d 824 (1977), and Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979), the issues for resolution on the trial of a special plea of incompetency to stand trial, as opposed to the trial of a case where the defendant offers a defense of insanity at the time of the criminal act,are separate and distinct. On the trial of the special plea of incompetency to stand trial the issue is whether the defendant:

> "'is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands.'" Crawford, supra, at 326.

On the trial of the main case, where the defense presented is that of insanity, the issue is whether at the time of the commission of the act, omission or negligence constituting the crime, the defendant possessed the mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence. Crawford, supra at 326. Ga. Code Ann. § 27-702.

As is apparent, the issue of Petitioner's competency to stand trial, which had already been decided adversely to Petitioner, was irrelevant and immaterial upon the trial of the main case. Thus, the trial court properly sustained the district attorney's objection to Petitioner's attempts to interject the same into the trial of the main case. Accordingly, this meritless contention cannot serve as the basis for the granting of the requested writ.

F. THE TRIAL COURT COMMITTED NO ERROR BY SUSTAINING THE DISTRICT ATTORNEY'S OBJECTION TO AN IRRELEVANT AND IMMATERIAL QUESTION PROPOUNDED BY COUNSEL FOR PETITIONER ON DIRECT EXAMINATION OF HIS OWN EXPERT WITNESS. (Contention No. 6).

During the trial on the special plea of incompetency to stand trial, counsel for Petitioner sought to solicit a response to the following question propounded by counsel to his own expert witness:

"Q. Doctor, do you feel that treatment will afford Robert Strickland to be able to stand trial, at a future date?

MR. COLE: If it please the Court, that would be irrelevant to this case and I would object to it.

THE COURT: Objection sustained." (T. 203).

In a proceeding on a special plea of incompetency to stand trial the issue for the jury's determination is whether the defendant is capable at the time of trial of understanding the nature and object of the proceedings

against him and their effects upon him, and whether the defendant is capable of assisting his attorneys in the litigation of his cause.

> ". . . the issue raised by a special plea of insanity at time of trial 'is not, whether the defendant can distinguish between right and wrong, but is, whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands.'" Crawford v. State, 240 Ga. 321, 326, 240 S.E.2d 824 (1977).

As is apparent after an examination of the foregoing authority, only the defendant's competency to presently stand trial is at issue, not his competency at some point in the future. Accordingly, the trial court properly sustained the district attorney's objection to the subject question propounded by Petitioner's counsel along the aforementioned irrelevant lines of inquiry. This contention therefore, cannot serve as the basis for the granting of the requested writ.

G. THE TRIAL COURT PROPERLY SUSTAINED THE DISTRICT ATTORNEY'S OBJECTION MADE DURING PETITIONER'S CLOSING ARGUMENT WHEN COUNSEL FOR PETITIONER ATTEMPTED TO ARGUE THE CONSEQUENCES OF THE JURY'S FINDING OF NOT GUILTY BY REASON OF INSANITY. (Contention No. 7).

On this contention Petitioner alleges that the trial court improperly sustained the district attorney's objection to Petitioner's attempt in closing argument to argue to the jury the consequences of a finding of not guilty by reason of insanity. (T. 1066).

In Hulsey v. State, 233 Ga. 261, 210S.E.2d 797(1974), the Supreme Court of Georgia stated that because the latter portion of Ga. Code Ann. § 27-1503 relates to "matters not pertinent to the jury's determination of guilt or innocence," it was not appropriate to charge the same to the jury. For those reasons set forth in Hulsey, supra, the trial court properly sustained the district attorney's objection to defense counsel's attempts to argue the latter portion of Ga. Code Ann. § 27-1503 to the jury, i.e., the disposition of the defendant upon a finding of a verdict of not guilty by reason of insanity was a matter not pertinent to the jury's determination of guilt or innocence.

Accordingly, this meritless contention cannot serve as the basis for the granting of the requested writ.

H. PETITIONER'S CONTENTION THAT UNDER THE FACTS OF THIS INSTANT CASE THE § (b)7 AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE IS WITHOUT MERIT.
(Contention No. 8).

On this instant petition for a writ of certiorari Petitioner presents a lengthy argument in support of his contention that Ga. Code Ann. § 27-2534.1(b)7 is unconstitutional as applied to the facts of this instant case.[2/] Citing Godfrey v. Georgia, 446 U.S. 420 (1980), Petitioner essentially contends that the trial court failed to give a proper "limiting instruction" regarding the application of § (b)7. Petitioner however, fails to set forth the form such a "limiting instruction" should conceivably take. Petitioner further contends that there exists no evidence in this case to support the jury's finding of the § (b)7 aggravating circumstance.

In Cape v. State, 246 Ga. 520, ___ S.E.2d ___ (1980), the Supreme Court of Georgia was provided with the opportunity to address itself to this issue regarding the alleged need for a limiting instruction on the § (b)7 aggravating circumstance. In Cape, supra, citing Godfrey v. Georgia, supra, the Supreme Court of Georgia reiterated that "'The validity of the Petitioner's death sentence turns on whether, in light of the facts and circumstances of the murders. . ., the Georgia Supreme Court can be said to have applied a constitutional construction of [27-2534.1(b)(7)].'"

2/ A copy of Ga. Code Ann. § 27-2534.1(b)7 is attached as Respondent's Appendix B.

In this instant case, unlike in Godfrey v. Georgia, supra, the jury returned a full and proper finding of the § (b)7 aggravating circumstance, thereby alleviating any necessity for speculation by the appellate court as to the jury's interpretation of any partial finding of § (b)7. With the necessity for speculation by the appellate court removed, rational review of the imposition of the death penalty becomes possible and the fatal defect of Godfrey v. Georgia, supra, is removed.

Thus, Godfrey v. Georgia, supra, is clearly distinguishable from this instant case and accordingly there exists no necessity for a "limiting instruction."

Further, the finding of the § (b)7 aggravating circumstance is amply supported by the evidence beyond a reasonable doubt. In Hance v. State, 245 Ga. 856, 268 S.E. 339(1980), the Supreme Court of Georgia stated that § (b)7 consists of two major components, the second of which has three subparts.

> "(I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant." Hance, supra, at 860.

In order to determine whether the jury's finding of § (b)7 is supported by the evidence, the Supreme Court of Georgia stated that "The evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one subpart of the second component, ..." Hance, supra, at 861.

With regards to a finding of depravity of mind of the defendant, the Supreme Court of Georgia stated that such could be demonstrated by evidence of psychological abuse by the defendant to the victim prior to death, i.e., the anticipation of physical harm. Further, in determining whether the evidence shows depravity of mind, the court stated that "The age, and physical characteristics of the victim may be considered." Hance, supra, at 862.

In this instant case the § (b)7 aggravating circumstance was found by the jury to exist beyond a reasonable doubt in the murder of Bonnie Mae Carroll in that the aforementioned murder was "outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind." (R. 78). The evidence revealed that these were well planned execution style murders. The Petitioner conceived the plan, which required the murder of several members of June's family but not June herself, the Petitioner communicated the plan to June, the Petitioner armed himself accordingly, and then cold-bloodedly implemented his plan.

Prior to the murders the Petitioner had written numerous letters in conjunction with telephone calls to June telling her that he would kill certain selected members of her family in order that she might "know what it felt like to watch somebody [she] loved die and to loose someone [she] loved." (T. 868). On the day before the murders, November 29, 1979, Petitioner sent an envelope which he entitled "last letter" to June wherein he stated that if she were to date any other man:

> ". . . I will do what I said I would do." (T. 1227).

The evidence revealed that Petitioner methodically moved from room to room in the Carroll house, killing certain members of the Carroll family. Petitioner began by shooting Bonnie Mae Carroll, who Petitioner felt had weakened his relationship with June, no less than four times in the face at point blank range with hollow point bullets. The results were massive destruction of the brain and face. Petitioner then moved through the house, killing his victims with multiple gunshot wounds to the upper body and head. However, Petitioner chose not to kill June, but in order to assure that she would indeed suffer not only with the loss of her family, but with her pain too, Petitioner methodically inflicted the following wounds:

> "Two in the abdomen; two of each thigh; five of the buttocks area, down around the rectum; and one in the right foot." (T. 794).

The Respondent cannot help but note that all of the aforementioned wounds, unlike those suffered by the other victims, were inflicted below the chest and head. Further, the number of wounds demonstrate that Petitioner must have had to reload his pistol at some point during the shooting of June Carroll. The facts of this case show nothing less than the cold-blooded execution style killing of innocent people. The Petitioner methodically purchased the necessary materials for the murders and concealed the weapon under a large coat in order to get into the Carroll home. The Petitioner, in fulfillment of his prior threats, killed selected members of June Carroll's family and seriously injured and maimed June Carroll all in order that June might suffer. The facts of this case remove it from that category

of ordinary murders and places it squarely under the § (b)7 aggravating circumstance. The circumstances of the murder of Bonnie Mae Carroll reflect nothing less than the mental processes and manifestations of a depraved mind. As correctly noted by the Supreme Court of Georgia on direct appeal of this instant case:

> "Depravity may be proven in many ways, including, as in the present case, by the killing of a vi tim in a vile, horrible or inhuman manner so as to inflict mental distress upon her close relative." Strickland, supra, at 232.

As is readily apparent upon an examination of the gruesome facts of this instant case, Petitioner's challenges to the applicability of the § (b)7 aggravating circumstance are without merit. Thus, this contention cannot serve as the basis for the granting of the requested writ.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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